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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SHAMAL BRIDER, Defendant and Appellant.	B200456 (Los Angeles County Super. Ct. No. BA306838)

APPEAL from a judgment of the Superior Court of Los Angeles County, Morris B. Jones, Judge. Affirmed.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Shamal Brider appeals from the judgment entered following a jury trial in which he was convicted of possession for sale of cocaine base (Health & Saf. Code, § 11351.5) and a court trial in which he was found to have suffered one prior conviction of a serious or violent felony within the meaning of the "Three Strikes" law (Pen. Code, §§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)), a prior conviction within the meaning of Health and Safety Code section 11370.2, subdivision (a), and to have served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). The court granted appellant's motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike his prior strike conviction and sentenced him to prison for a total of nine years, consisting of the middle term of four years, plus three years for the enhancement found true pursuant to Health and Safety Code section 11370.2, subdivision (a), plus two, one-year enhancements for his prior prison terms. He contends the trial court erroneously permitted the jury to convict him of possession for sale of cocaine base even if it found he had not harbored the specific intent to sell. For reasons stated in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On July 31, 2006, at approximately 8:15 p.m., Los Angeles Police Officer Erika Cruz was working patrol in the area of 7th Street between Main and Los Angeles Streets when she saw appellant standing underneath a restaurant awning. A man and a woman approached and while appellant spoke to them he looked to his left and to his right, stood on his tiptoes and with his right hand reached into the back of his pants and pulled out a plastic baggie. Appellant opened the baggie and handed the male and female several of the off-white solids contained in the baggie. Officer Cruz was approximately 30 feet away and could clearly see the plastic baggie and the exchange of the off-white solids. Appellant placed the baggie containing the remaining off-white solids back around his buttocks area and took an unknown amount of currency from the male and the female and put it in his left front pocket. The buyers then walked away.

At the time of trial, Officer Cruz had been a police officer for one and one-half years. Previous to the present offense, she had made approximately one hundred arrests

for narcotics and booked the evidence. Eighty percent of the arrests were for rock cocaine. Additionally, during training at the police academy, she took a narcotics class. Based on her experience and training, the off-white solids appellant was holding resembled rock cocaine.

Appellant was arrested and transported to the police station. A total of $257 in cash, consisting of a $100 bill, four $20 bills, three $10 bills, nine $5 bills and two $1 bills, was recovered from appellant and booked into evidence. Additionally, the off-white solids and a small baggie containing a green, leafy substance resembling marijuana were booked.

After appellant's arrest, Officer Cruz went to appellant's residence, a hotel on South Main Street. There she recovered forty-nine $1 bills "folded in a wad" and a green leafy substance resembling marijuana. She found no narcotic paraphernalia. Los Angeles Police Officer Domingo Silva, a police officer for approximately five years and a court certified expert in rock cocaine, heroin and marijuana, conducted a strip search of appellant and recovered, from between appellant's buttocks, a plastic bindle that contained approximately 10 off-white solids that resembled rock cocaine.[1] Officer Silva opined the cocaine found was worth approximately $100 street value and was approximately twenty doses. It was Officer Silva's opinion that the cocaine was possessed for purpose of sale. His opinion was based on the transaction seen, the location of appellant, a high narcotics activity area, the manner appellant was concealing the cocaine, the fact that he did not possess paraphernalia for using the cocaine and the amount and denominations of the currency found. Officer Silva's partner, Officer Steve Rodriguez, also believed the cocaine was possessed for sale.

Appellant testified on his own behalf that officers searched him but found no cocaine. Appellant claimed one of the police officers reached into his own sock and pulled out a white baggie.

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[1] The off-white solids were later determined to contain cocaine in the form of cocaine base.

DISCUSSION

Appellant contends that because the lesser included offense instruction erroneously stated "possession for sale" is a lesser included offense to "possession for sale" it permitted the jury to convict him of the charged crime even if it found he had not harbored the specific intent to sell. Appellant notes there was no serious dispute as to whether he actually possessed cocaine but rather whether he possessed the cocaine base with the specific intent to sell.

The trial court instructed the jury, "The defendant is charged in count 1 with possession for sale of cocaine base, a controlled substance. To prove that the defendant is guilty of this crime, the people must prove that, one, the defendant unlawfully possessed a controlled substance; two, the defendant knew of it's [*sic*] presence; three, the defendant knew of the substance's nature or character as a controlled substance; four, when the defendant possessed the controlled substance, he intended to sell it; and five, the controlled substance was cocaine base; and, six, the controlled substance was in a usable amount."

The trial court thereafter instructed the jury, "A lesser included offense of count 1 is possession for sale [*sic*] of cocaine base. To prove that the defendant is guilty of this crime, the people must prove that; one, the defendant unlawfully possessed a controlled substance; two, the defendant knew of its presence; three, the defendant knew of the substance's nature or character as a controlled substance; four, the controlled substance was cocaine base; and five, the controlled substance was in a usable amount."[2]

The court further instructed, "If all of you find that the defendant is not guilty of a charged crime, you may convict him of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. [¶] Now I will explain to you which crimes are affected by this instruction. Possession of a controlled substance is a lesser crime of possession for sale of a controlled substance as charged in count 1.

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[2] The written instruction given to the jury also contained this error and was entitled "CALCRIM 2302. Possession for Sale of Controlled Substance."

You must consider each of these crimes and decide whether the defendant is guilty or not guilty of each one. It is up to you to decide the order in which you consider each crime and the relevant evidence. I can only accept a guilty verdict of a lesser crime if you all agree that the defendant is not guilty of the charged crime and give me a signed verdict form of not guilty for the charged crime. [¶] You will receive verdict forms for the charged crime and the lesser crime. If all of you are convinced beyond a reasonable doubt that the defendant is guilty of a greater crime, do not fill out or sign the verdict form for the crimes that are lesser than the crime. Give the unused forms back to me unsigned."

The prosecution and defense counsel argued the element of intent to sell. The prosecution argued "in this case, it's a fairly easy situation because Officer Cruz saw [appellant] sell it, that is in fact what led to the whole arrest." The prosecution also explained, "You're also going to be instructed on what's called a lesser included. And that is simple possession of a controlled substance. And basically, what the lesser included omits is No. 4, that the defendant intended to sell it. So it has all of the elements except four, one of them, and that makes – and if you find that [appellant] possessed cocaine base but did not in fact intend to sell it, then you would find him guilty of the lesser included. However, . . . it's my position based on the evidence that's come out that all of the evidence shows that [appellant] possessed the cocaine base and possessed it for purposes of sales. So the lesser included is not the real crime that was committed; but it's the greater crime, which is the possession for sale of the controlled substance."

Appellant's attorney argued circumstantial evidence was the only evidence the prosecutor offered about appellant's intent in possessing. "If you can prove that he did in fact possess the narcotics, you still have to decide if he intended to sell the narcotics that he had . . . ." Counsel argued "in this case the circumstantial evidence is completely consistent that [appellant] intended to use and not to sell the remaining narcotics, if you believe he in fact had narcotics in his possession." Appellant's counsel explained further, "I'm talking now about the lesser included offense. Because if he had the cocaine, but you're not convinced beyond a reasonable doubt that he was going to sell the cocaine,

then he wouldn't be guilty of possession for sale, he would be guilty of simple possession."

The jury returned the verdict form finding appellant guilty "of the crime of POSSESSION FOR SALE OF COCAINE BASE, in violation of Health and Safety Code Section 11351.5, a felony, and who did unlawfully possess for sale and purchase for the purposes of sale cocaine base as charged in Count 1 of the Information."

Apart from the fact that appellant failed to request a clarification or modification of the instruction and thus forfeited his right to claim error on appeal, (see *People v. Johnson* (1992) 3 Cal.4th 1183, 1236 and cases cited; *People v. Coddington* (2000) 23 Cal.4th 529, 584) appellant suffered no prejudice from the error contained in the instruction. Rather than being an error that allowed appellant to be convicted on an incorrect theory of culpability, the error was a minor one in the caption and introductory sentence of the instruction which was not prejudicial.

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art VI, § 13.) "A miscarriage of justice occurs only when it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the error. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277-278.)

The jury received several instructions regarding the charged offense of possession for sale of cocaine and the lesser included offense of simple possession. Considering the instructions as a whole, arguments of counsel and the verdict forms, we conclude it is not reasonably likely the jury understood the challenged instruction to mean it could convict appellant of possession for sale of cocaine base without finding when appellant possessed it he intended to sell it. (See *People v. Frye* (1998) 18 Cal.4th 894, 958.)

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.